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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 325

JAMES A. WATTS AND WALTER B. BLUE, *Petitioners*,

v.

SEWARD SCHOOL BOARD AND BOARD OF EDUCATION, APPEAL HEARING COMMITTEE, *Respondents*.

On Writ of Certiorari to the Supreme Court of Alaska

MOTION FOR LEAVE TO FILE A SUPPLEMENTAL MEMORANDUM AND SUPPLEMENTAL MEMORANDUM FOR PETITIONERS

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MOTION FOR LEAVE TO FILE A SUPPLEMENTAL MEMORANDUM

Petitioners respectfully move this Court pursuant to Rule 41(5) for leave to file a supplemental memorandum which calls the Court's attention to a decision rendered subsequent to argument and comments briefly thereon. The decision is that of the United States Court of Appeals for the District of Columbia Circuit,

in *Meehan* v. *Macy*, (No. 20, 812, April 18, 1968). The opinion of the Court in *Meehan* is addressed to the basic issues involved in *Watts*. And while that opinion supports our position in part, the over-all view it expresses, contains significant inconsistencies, ambiguities and errors. We therefore urge the Court to receive and consider our comments on that case.

Respectfully submitted,

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In the
Supreme Court of the United States

October Term, 1961

No. 324

JAMES A. WARE AND WILLIAM B. BEEK, *Petitioners*,

v.

SEWARD SCHOOL BOARD AND BOARD OF EDUCATION, APPEAL HEARING COMMITTEE, *Respondents*.

On Writ of Certiorari to the Supreme Court of Alaska

SUPPLEMENTAL MEMORANDUM FOR PETITIONERS

I.

In *Kitchen v. Hare*, the Court of Appeals said:

"As Government services multiply, the function of Government supervision alone is the function of an increasing and substantial portion of the citizenry, and can scarcely afford [illegible]
[illegible]
With Respect to Discharge of Employees

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 325

JAMES A. WATTS AND WALTER B. BLUE, *Petitioners*,

v.

SEWARD SCHOOL BOARD AND BOARD OF EDUCATION, APPEAL HEARING COMMITTEE, *Respondents*.

On Writ of Certiorari to the Supreme Court of Alaska

SUPPLEMENTAL MEMORANDUM FOR PETITIONERS

I.

In *Meehan* v. *Macy*, the Court of Appeals said:

> "As Government services multiply, the liberties of Government employees come to be the liberties of an increasing and substantial portion of the citizenry, and are accordingly given increased recognition. There is a reverse side to the coin: With mounting provision of increased and increasingly indispensable services rendered by Gov-

> ernment employees, the public weal demands administration that is effective and disciplined, and not beset by turmoil and anarchy."[1]

The latter theme reappears, in even more vigorous language:

> "Free and open discussion within an agency of Government is wholly different from heated debate flowing into the public arena. While a free society values robust, vigorous and essentially uninhibited public speech by citizens, such public speech by Government employees may produce intolerable disharmony, inefficiency, dissension and even chaos."[2]

But this possibility is not the unique characteristic of speech by government employees:

> "Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press."[3]

The very question to be decided is whether the abuse is such that the Constitution tolerates the inhibition of speech or other First Amendment rights. The facts recited at pp. 16-17 of the Court of Appeals' opinion may well have justified its conclusion that appellant Meehan's distribution of the letter and poem had such "repercussions in terms of the foreign policy and diplomacy of the United States" as to constitute "a

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[1] Opinion of the Court (hereafter cited as Op.), p. 13. References to footnotes in the Court's opinion will be omitted throughout. The Opinion is reproduced as an Appendix, *infra*.

[2] Op. p. 15.

[3] Madison, in 4 Elliot's Debates on the Federal Constitution, p. 571, quoted in *New York Times* v. *Sullivan*, 376 U.S. 254, 271.

substantive evil actually designed to impede"[4] the operations of the Government in the Canal Zone, thus justifying Meehan's discharge, under the test which we have urged (Pet. Br. pp. 36-37).[5] But it would not be a proper ground for dismissal that Meehan meant "to stir up the reader enough to be receptive to the suggestion that he write his Congressman." Op. p. 20. The prevention of "dissension and chaos" in the administration of government is a "compelling state interest" which may justify the subordination of the employee's free speech; but this is not true of "dissension and chaos" in the public forum, because that is precisely what the First Amendment envisages.

Accordingly, we must respectfully disagree with the Court of Appeals' statement that "Government employees do, to some extent, have lesser rights than others have under the Constitution"[6] and with those portions of its opinion which reflect that approach, particularly those which draw a parallel between the rights of public and private employees, such as the following: "We think it is inherent in the employment relationship as a matter of common sense if not

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[4] *Wood* v. *Georgia*, 370 U.S. 375, 389.

[5] Another example of a permissible limitation is suggested by the Court of Appeals' reference to "the routine service of the Government" (Op. p. 14). Government cannot operate unless the officials ultimately responsible for agency action are served in policy-making and other confidential roles by subordinates in whom they can repose complete confidence. Thus, the constitutional standard which governs all First Amendment cases may lead to a different result when public criticism of his superior originates with a "non-routine" employee.

[6] Op. p. 14. This proposition is squarely refuted by *Garrity* v. *New Jersey*, 385 U.S. 493, 500, which is nonetheless quoted with approval by the Court of Appeals, Op. p. 18, n. 34.

common law that an employee cannot reasonably assert a right to inveigh against his superiors in public and at the same time keep his job." (Op. p. 19)[7] Even in nonpublic employment the "common sense" of employer self-interest has long been compelled to yield to higher public policies.[8] And when the government is the employer, such higher public policy is embodied in the Constitution itself, which, as the Court of Appeals of course recognized, may impinge on the government's "prerogative to hire and fire employees." (Op. p. 14).

The analogy to the private employment relationship is unsound for the more fundamental reason that the objective of government is to promote the general welfare. Achievement of that goal presupposes full public discussion of its affairs—even though this may entail "inveighing against" public officials. When our Nation was founded, this profound truth was regarded as "Common Sense" only by such courageous and far-sighted men as Thomas Paine, Thomas Jefferson, and James Madison, but it is now firmly established as constitutional doctrine.[9] Such discussion will be se-

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[7] This passage has the same beguiling simplicity, and carries equally devastating implications for the First Amendment rights of public employees, as Justice Holmes' "oft-quoted phrase" regarding the constitutional rights of policemen, which the Court of Appeals disapproved. (Op. pp. 13-14).

[8] It is certainly "common sense" for an employer to forbid his employees to join unions, yet the "yellow-dog" contract has long been outlawed.

[9] "The First Amendment, said Judge Learned Hand, 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.' *United States* v. *Associated Press*, 52 F. Supp. 362, 372 (D.C.S.D.N.Y. 1943)." *New York Times* v. *Sullivan*, 376 U.S. at 270.

verely inhibited if the right of public employees to criticize their superiors is subject to norms of "loyalty" derived from private employment, particularly when those norms fail to identify the "employer" to whom "loyalty is due"—the superior official, government as a whole, or the people, who "possess the absolute sovereignty."[10] The public often receives facts and opinions which would otherwise be unavailable from dedicated employees who contemplate no personal advantage. But the Court of Appeals left the unmistakable impression that a disinterested employee would be especially vulnerable to discharge.[11] This is a paradoxical inversion of this Court's holdings that First Amendment freedoms are not forfeited because they are exercised for private purposes or to make a profit. Of course, it was not the reasoning of those decisions that speech selfishly motivated is more valuable; rather, they recognized that if it were denied protection, the "effect would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.'"[12] The freedoms to speak and to hear, to ~~punish~~ PUBLISH and to read, are correlative and indivisible.[13]

[10] *Id.*, 376 U.S. at 274.

[11] "An employee who flouts elemental loyalty to his employer and their common enterprise provides cause for discharge, except as his acts may be necessary to preserve his own protected rights. Loyalty to the Government employer cannot be held to compel total servility of thought and expression, but it does set a limit on channels and methods available to indicate disagreement with a superior official." (Op. p. 16).

[12] *New York Times, supra,* 376 U.S. at 266.

[13] See, in addition to cases previously cited, *Martin* v. *Struthers,* 319 U.S. 141, 143; *Lamont* v. *Postmaster General,* 381 U.S. 301, 307, and 308 (concurring opinion).

It is this failure to appreciate the "interest of the public in hearing all sides of a public issue" [14] which underlies the Court of Appeals' ready acceptance of "channels" within which the employee must confine his criticism.[15] When Government policy has become frozen, "the power of reason as applied through public discussion" is the ultimate safeguard of the People. Yet experience has taught that in such circumstances the responsible officials are particularly sensitive to and resentful of opposition. They then take refuge behind artificial barriers, depriving the public of access to information without which there can be no meaningful public discussion. For confirmation, we need not look beyond the record in this case.[16]

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[14] *Bond* v. *Floyd*, 385 U.S. 116, 136. Only when the Court of Appeals passed the constitutional discussion did it make reference to this public interest. See, Op. p. 22, text and note at n. 40 where *Bond* is cited. Even this fleeting recognition is more than this interest received in the majority opinion of the Supreme Court of Alaska.

[15] Op. pp. 15-16. To be sure, "Free and open discussion within an agency of Government is wholly different from heated debate flowing into the public arena" (Op. p. 15), but both are indispensable to the government of a free people. It will be noted that the Court of Appeals unconsciously weighted the comparison by its use of adjectives. "Heated debate" within an agency may likewise "produce intolerable disharmony" (Op. p. 15) without any countervailing benefit to public debate. This is illustrated by *Houston* v. *United States*, 297 F. 2d 838 (Ct. Cl.), *cert. denied*, 371 U.S. 815 and *Krennrich* v. *United States*, 340 F. 2d 653 (Ct. Cl.), *cert. denied*, 382 U.S. 870 (Op. p. 15, n. 31), which were therefore rightly decided.

[16] An additional objection to a requirement that employees take their objections through internal channels is that time is usually of the essence for the exercise of First Amendment rights. It follows that such regulations can pass constitutional muster only if internal discussion and resolution of a problem would be inhibited by premature exposure to the public, or if they are necessary

II.

We of course agree with the Court of Appeals that "There is a particular need for clarity and specificity when Government officials are engaged in regulating speech."[17] But it is entirely inconsistent with that principle to approve "catch all" provisions as necessary and adequate, at least where they are construed to reach political activity and other exercises of First Amendment rights. See Pet. Br. p. 42, Reply Br. p. 11. Since the Court of Appeals specifically referred to "immorality," we note also that the Alaska Supreme Court's interpretation of that word is truly extraordinary. We note finally the striking coincidence that in *Meehan* as in *Watts* a "clearance" regulation was on the books, but a long course of contrary practice preceded its enforcement against employees who publicly criticized their superiors.[18] Of course, the Court of

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to preserve some equally important governmental purpose. Such instances will be rare. Failure to obey a rule requiring clearance was expressly held to be an insufficient cause in *Klein* v. *Civil Service Commission,* 152 N.W. 2d 195 (Iowa Sup. Ct.) although the case involved firemen, who are subject to considerably higher standards of discipline than most government employees. Even where such regulations are permitted, they must be narrowly drawn and their enforcement carefully scrutinized by the courts to assure fidelity to the First Amendment. Thus, there is considerable merit to the idea that such regulations must assure prompt "exhaustion" or "clearance," see Op. p. 25, n. 44.

[17] Op. p. 15. We do not understand why the requisite degree of clarity should depend on whether the activity is undertaken in duty hours (Op. p. 18). If an employee fails to perform his assigned work tasks during duty hours, he can be disciplined for *that*.

[18] The dissimilarities should also be noted. In *Meehan* the regulation itself was sufficiently precise. Its subject matter was expressly the distribution of articles and other information to the public, its command was clear, and there was apparently no other regulation which prescribed a different procedure. Compare Op. p. 24 with Pet. Br. pp. 14a-15a.

Appeals was able to reverse on this issue by announcing a rule of federal administrative law, but the requirement of "fair warning" (Op. p. 24) is of constitutional dimensions "in the area of free expression." *N.A.A.C.P.* v. *Button,* 371 U.S. 415. 432.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,812

RICHARD D. MORGAN, Appellant

v.

John W. Macy, Jr., Chairman, et al.,
Civil Service Commission, et al.,
Appellees

APPENDIX

Appeal from the United States District Court
for the District of Columbia

Decided April 18, 1968

Mr. Edward L. Morgan for appellant.

Mr. Joel M. Finkelstein, Assistant United States Attorney, with whom *Messrs. David G. Bress*, United States Attorney, *Frank Q. Nebeker* and *Mrs. Ellen Lee Pace*, Assistant United States Attorneys, were on the brief, for appellees. *Mr. Brent R. Schoenfeld*, Assistant United States Attorney, also entered an appearance for appellees.

Before EDGERTON, *Senior Circuit Judge*, and TAMM and LEVENTHAL, *Circuit Judges*.

LEVENTHAL, *Circuit Judge*: This is an appeal from an order granting the Government's motion for summary judgment dismissing an action by a former employee of the Canal Zone who attacks as unlawful his 1964 discharge by the Canal Zone Government, which was affirmed by the Civil Service Commission in 1965.